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No. 84-355

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

– against –

LEMUEL SMITH,

Respondent.

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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IN THE

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No. 84-355

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

-against-

LEMUEL SMITH,

Respondent.

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Question Presented

Do the Eighth and Fourteenth Amendments require that a defendant be given the right to present relevant mitigating factors before a sentence of death may be imposed?

Opinions Below

The opinion of the Court of Appeals for the State of New York is reported at 63 N.Y. 2d 41 (1984).

Statement of the Case

Respondent was indicted on October 6, 1981 under N.Y. Penal Law §125.27(1)(a)(iii). By motion dated November 25, 1981, Respondent moved to dismiss the indictment, alleging that N.Y. Penal Law §125.27(1)(a)(iii) violated, inter alia, the Eighth and Fourteenth Amendments to the Constitution of the United States. By order and opinion dated December 11, 1981, the trial court denied the motion.

Respondent was convicted on April 21, 1983, and sentenced to death, pursuant to N.Y.Penal Law §§ §60.06 and 125.27(1)(a)(iii), on June 10, 1983.

On July 2, 1984, the New York Court of Appeals affirmed Respondent's

conviction, but declared unconstitutional N.Y. Penal Law §§60.06 and 125.27(1)(a)(iii), on the ground that they did not permit consideration of individualized mitigating and aggravating factors. The Court of Appeals remanded the case to the trial court for resentencing. Respondent has not yet been resentenced.

Summary of the Argument

The Court should not exercise its certiorari jurisdiction to review the constitutionality of this mandatory death penalty statute. No state or federal jurisdiction currently has a mandatory death penalty statute. Since Furman v. Georgia, 408 U.S. 238 (1972), every state with a mandatory death penalty has either legislatively or judicially repealed its statute.

Even if a mandatory death penalty law was constitutionally permissible for life-sentenced inmates who commit murder,

the statute under review is too broad to pass constitutional muster. Because Penal Law §125.27(1)(a)(iii) applies to a wide variety of inmates, many of whom are serving terms with a minimum as short as fifteen years, it unconstitutionally treats a disparate group of offenders as an undifferentiated mass.

Certiorari is also inappropriate because petitioner tacitly concedes the unconstitutionality of the statute. Petitioner relies on the specific criminal history of respondent to argue for the death penalty. By conducting a "paper" mitigation-aggravation hearing, petitioner demonstrates the need for a death sentencing procedure which is keyed to the individual defendant and which offers an opportunity to rebut the allegations against him and present mitigating factors on his own behalf.

ARGUMENT

I. THE CONSTITUTIONALITY OF NEW YORK PENAL LAW §125.27(1)(a)(iii) DOES NOT PRESENT A QUESTION ON WHICH STATE OR FEDERAL COURTS HAVE DIFFERED, NOR DOES IT PRESENT AN IMPORTANT, UNRESOLVED ISSUE OF FEDERAL LAW.

This Court has traditionally reserved the exercise of its certiorari jurisdiction to resolve only those questions which have divided state high courts and federal courts of appeals, created conflicts between state high courts and federal courts of appeals, or which present important issues of federal law which should be resolved by it. Rule 17, Sup. Ct. R. (Rev. ed. 1980). The constitutionality of N.Y. Penal Law §125.27(1)(a)(iii) does not fall within any of these guidelines.

No state or federal jurisdiction currently has a mandatory death penalty statute. Most jurisdictions abandoned mandatory death penalty laws by the early

part of this century. Although ten states enacted such statutes following Furman v. Georgia, 408 U.S. 238 (1972), under the erroneous assumption that Furman required a mandatory statute, seven of these statutes were subsequently amended by state legislatures to provide for "guided discretion" death penalty schemes, see Ala. Code §13-11-2(a) (1975) (repealed)(discretionary statute at Ala. Code §13A-5-39-57 (West Cum. Supp. 1983); Ind. Ann. Stat. §10-3401(6)(iv)(Supp. 1973)(discretionary statute at Ind. Code Ann. §§35-50-2-3, -9 (Burns, 1979); La. Rev. Stat. Ann. §14:30(3)(West, 1974)(discretionary statute at La. Rev. Stat. Ann. §14:30 (West Cum. Supp. 1980); Nev. Rev. Stat. §300.030(I)(b)(1973)(discretionary statute at Nev. Rev. Stat. §§200.030, .033, .035 (1980); Okla. Stat. Ann. tit. 21, §701.1(7)(West Supp. 1973)(repealed)

(discretionary statute at Okla. Stat. Ann. tit. 21, §§701.7, 701.9-.15 (West Supp. 1980-1981); Va. Code §§18.2-10, -31(c), 19.2-264.2 to .4 (Cum. Supp. 1980), one was judicially amended to survive as a guided discretion statute, Jackson v. State, 337 So.2d 1242, 1253-57 (Miss. 1976), and two were declared unconstitutional by state high courts, People v. Smith, 63 N.Y. 2d 41 (1984); State v. Cline, __R.I.__, 397 A.2d 1309 (1979). This Court has never upheld a mandatory death penalty statute. The history of mandatory statutes, across the Nation and in New York State, indicates a decisive rejection of such laws. There is no need for this Court to use its certiorari jurisdiction to resolve a question that has been decided in the same way in every available forum.

A. Prior To Furman, The Nation Had Rejected Mandatory Death Penalty Statutes.

In Woodson v. North Carolina, 428 U.S. 280 (1976), this Court traced the history of the mandatory death penalty, noting that, at the time the Eighth Amendment was adopted in 1791, the Nation retained its common-law heritage and prescribed death as the only penalty for a broad range of offenses. See, e.g., H. Bedau, The Death Penalty in America, 5-6, 15, 27-121 (1967); R. Bye, Capital Punishment in the United States, 1-3 (1919). Dissatisfaction with this remnant of a redoubtable colonial legacy soon prompted state legislatures to limit the type of offenses for which the penalty would be imposed. Bedau, supra, at 23-24; Bye, supra, at 5; Knowlton, Problems of Jury Discretion in Capital Cases, 101 U. Penn. L. Rev. 1099, 1102 (1953). This reform prompted yet further "narrowing" until, by

the early 18th century, the mandatory death penalty was authorized only for certain types of homicide. Woodson, 428 U.S. at 290-292.

Even these reforms, however, resulted in frequent jury nullification. Many plainly guilty offenders were acquitted because the jury did not wish to impose the penalty of death. Bedeau, supra at 27. Tennessee became the first state to address this problem by adopting a statute permitting jury discretion as to sentence. Tenn. Laws. 1837-1838, c. 29. By 1900, 25 states and the federal government had abandoned the mandatory death penalty in favor of discretionary statutes. Woodson, 428 U.S. at 291. Fourteen more states followed suit in the next two decades. By 1963, no jurisdiction in the country retained the mandatory death penalty generally for the crime of murder. Woodson, 428 U.S. at 291-92. No state,

prior to Furman, ever returned to a mandatory death penalty after adopting a discretionary statute. Woodson, 420 U.S. at 295 n. 30.

This widespread rejection was not limited to general mandatory death penalty statutes. Even mandatory death sentences for murders by life-term prisoners had become relics. Only five states (New York not among them), had such statutes by 1964.

B. The Confusion Over Furman And The Return of Mandatory Statutes

In Furman v. Georgia, 408 U.S. 238 (1972), this Court reversed several death sentences, but the majority failed to agree on a rationale. Each member of the Court produced a separate opinion. "Predictably, the variety of opinions supporting the judgment in Furman engendered confusion as to what was required in order to impose the death penalty in

accord with the Eighth Amendment." Lockett v. Ohio, 438 U.S. 586, 599 (plurality opinion). It was widely, if erroneously, believed that Furman required the elimination of any discretion in the imposition of capital punishment.

After Furman, ten states, including New York, enacted mandatory statutes. This was an unprecedented reversal of a previously inexorable historical trend away from such laws. Woodson, 428 U.S. at 295 n. 30. However, as this Court has observed, the new statutes did not "evince a sudden reversal of societal values regarding the imposition of capital punishment." They "reflect[ed] attempts by the States to retain the death penalty in a form consistent with the Constitution, rather than a renewed societal acceptance of mandatory death sentencing."

Id. at 298.[1] In the years following Woodson, Roberts (Harry) v. Louisiana, 431 U.S. 633 (1977), and Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976), all ten post-Furman mandatory statutes were abandoned. Significantly, all of these statutes were changed by the states themselves, without federal action.

C. The History Of New York's Mandatory Death Penalty Mirrors The National Trend.

Contrary to the assertions of Petitioner, Petition for Certiorari at 14, 26

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1 E.g., Note, Discretion and the Constitutionality of the New Death Penalty Statutes, 87 Harv. L. Rev. 1690, 1712 (1974) (concluding that "mandatory statutes seem to fulfill Furman's requirement that discretion in the sentencing process can be cabined."); People v. Fitzpatrick, 32 N.Y. 2d 499, 513 (1973) (striking down New York's 1967 death penalty legislation because "the Legislature, instead of providing mandatory death sentences for all defendants who kill police officers, has vested juries with a discretion to decide, case by case, whether that ultimate punishment should be inflicted.")

and n.16, New York state has not made any legislative determination that a mandatory death penalty is the best way to safeguard prison staff and inmates. The history of New York's death penalty law demonstrates a pre-Furman rejection of mandatory statutes, a brief revival after Furman, and then a total rejection following the Woodson and Roberts cases.

New York abandoned all mandatory death sentences in 1963. L. 1973, c. 994, §§1-2. The 1963 law retained the death penalty as an available punishment for all premeditated murders, but allowed the sentencer to determine when it should be invoked. The sentencer was permitted to consider "any matter relevant to the sentence, including but not limited to, the nature and circumstances of the crime, defendant's background and history, and any. . . mitigating circumstances. N.Y.

Penal Law §1045-a(13)(McKinney's Supp. 1965).[2]

The death penalty statute was again amended in 1967, so that its application was limited to murders of police officers or by life-term prisoners. L. 1967, c. 791. Even in those limited circumstances, however, it was still imposed on a discretionary basis. N.Y. Penal Law §§25.30, 125.35 (McKinney, 1967).

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[2]The legislative history of the 1963 amendment makes clear that New York had come to agree, albeit belatedly, that mandatory death sentences do not serve society's best interests. The supporting memorandum of the bill's sponsor, the Temporary State Commission on Revision of the Penal Law and Criminal Code, noted two primary benefits offered by the amendment. First, the "bill would achieve what is believed to be a most worthy objective, namely, that of terminating New York's solitary adherence to the mandatory death penalty for murder." Second, by expanding the scope of the sentencing hearing as widely as possible, the bill would provide for a "fairer and more enlightened medium for decision of this issue." 1963 McKinney's Session Laws of New York, 2018-20.

On the basis of this Court's decision in Furman, the New York Court of Appeals struck down the 1967 death penalty law in People v. Fitzpatrick, 32 N.Y. 2d 499, cert. denied, 414 U.S. 1033 (1973). Two weeks later, then Governor Rockefeller, who had brought about and praised the elimination of mandatory statutes just six years earlier, announced:

> I am deeply concerneed that the deterrent provided by the death penalty for the murder of peace officers. . . has been undermined by [Fitzpatrick]. In the interests of deterring such crimes, it is vital that the death penalty be retained in such cases. [Fitzpatrick and Furman hold] that the discretion permitted under State law as to application of the death penalty rendered it a cruel and unusual punishment. . . If. . . the Supreme Court upholds the State Court [decision in Fitzpatrick], I plan to offer legislation at the next session of the Legislature which would eliminate the discretionary nature of the death penalty and thus restore the penalty as to the murder of peace officers and prison guards.

Quoted in People v. Velez, 88 Misc. 2d 378, 397 (Sup. Ct. N.Y. Co. 1976).

The new statute retained the same categories of crimes which triggered the possibility of a death sentence under the 1967 law: the murder of a police officer or prison guard, or any murder by a person serving a life sentence. L. 1974, c. 367. Although New York State had, for over a decade, punished these crimes not with a mandatory death sentence but rather with a discretionary sentence of life or death, the Legislature now made these crimes subject to mandatory death because of the erroneous assumption that Furman left it no constitutional capital punishment alternative.

The new mandatory death penalty statute did not remain intact for long. In People v. Davis, 43 N.Y. 2d 17, cert. denied, 435 U.S. 998 (1977), the New York Court of Appeals struck down virtually all

of Penal Law §125.27 because it failed to provide for individualized consideration of mitigating and aggravating factors. Davis, 43 N.Y. 2d at 33.

Following Davis, the New York Legislature began a series of unsuccessful attempts to repeal §60.06 and enact a guided discretion death penalty law. In each instance, the effort failed because Governors Carey and Cuomo, outspoken opponents of capital punishment, vetoed the bills. Thus, by an ironic historical accident, §125.27(1)(a)(iii) survives, despite the apparent wishes of the last several sessions of the New York State Legislature and the last two Governors of New York.[3]

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[3]Even prior to People v. Smith, there was a widespread belief among the general population and the legal community alike, that New York had no death penalty. For example, in one of this Court's most

(Footnote Continued)

As the most recent bill passed by the Legislature demonstrates, New York does not need, desire, or assume to be constitutional, the mandatory execution of so-called life-term prisoners who murder. Senate Bill 1300/Assembly Bill 1565, passed by the Legislature on January 18, 1983, and vetoed on March 10, 1983, would have retained the language of subsection (1)(a)(iii), but made it merely one of ten aggravating factors sufficient to trigger the possibility of a death sentence. The amendment would have established a

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(Footnote Continued)
recent capital punishment decisions, it referred to and listed the thirty-five states it believed to authorize executions--without reference to New York. Enmund v. Florida, 102 S.Ct. 3368 (1982), id. at 3372-73 and nn.5-11, id. at 3388-89, and nn. 35-39. Moreover, in the two most recent veto messages of Governors Carey and Cuomo, they have described the vetoed bills as attempts to "reinstitut[e]" and "reinstate" the death penalty. Veto messages of June 9, 1982 and March 10, 1983.

bifurcated sentencing proceeding and given the defendant wide latitude to present relevant mitigating evidence.

New York was the last jurisdiction in the country to authorize mandatory execution. All of the post-Furman mandatory statutes have been replaced by discretionary statutes and/or been declared unconstitutional by state courts.[4] The entire Nation has reaffirmed its earlier rejection of mandatory death sentences. No branch of New York's government disagrees. There is no need for this Court to now

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[4]Granting certiorari and reversing the New York Court of Appeals would disrupt the orderly administration of justice. In the years following Furman, this Court has constantly sought to "fine-tune" death penalty law, allowing the states to impose capital punishment while maintaining clear standards for the exercise of guided discretion. To permit a mandatory statute to stand will simply create new uncertainty and another generation of litigation in an area which has become somewhat regularized and predictable.

pass on a question that has been well-settled for so long.

II. EVEN IF A MANDATORY DEATH PENALTY STATUTE MAY BE CONSTITUTIONAL IN A NARROW CLASS OF CASES, PENAL LAW §125.27(1)(a)(iii) IS TOO BROAD, TREATING A LARGE NUMBER OF DISPARATE PERSONS AND CRIMES AS AN UNDIFFERENTIATED MASS.

Petitioner argues that certiorari should be granted because the New York Court of Appeals has declared unconstitutional the type of "narrow" mandatory statute that this Court has never passed upon. Pet. for Cert. at 13-18. It is true that this Court has reserved decision on the constitutionality of a mandatory statute which applies to "an extremely narrow category of homicide." Woodson, 428 U.S. at 287 n. 7. New York Penal Law §125.27(1)(a)(iii), however, is potentially applicable to a wide variety of offenders with different criminal histories, expectations of release, and psychological

profiles, who have committed homicide under very different circumstances.

The reservation expressed by this Court in Lockett, 438 U.S. at 604 n. 11 (1978); Roberts (H.), 431 U.S. at 637 n. 5; Roberts (S), 428 U.S. at 334 n. 9; Woodson, 428 U.S. at 287 n. 7; and Gregg v. Georgia, 428 U.S. 153, 186 (1976), that a life-sentenced inmate has nothing to lose by taking the life of another prisoner or guard, was premised on the assumption that the "lifer" was serving a term with no possibility of parole.[5] Graham v. Superior Court, 93 Cal. App. 3d 880, 887, 160 Cal. Rptr. 10, 14 (1979) ("What the Supreme Court was concerned with was the possibility no penalty other than death might be available for the life prisoner.

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[5]Even this reservation was omitted in the Court's most recent discussion of the matter. Eddings v. Oklahoma, 455 U.S. 104 (1982).

Where there is a possibility of parole, the state has available the postponement of the parole date as well as a harsher term of confinement.")

In New York, there is no sentence of life without parole. After serving the minimum term, with appropriate reductions for "jail time," an inmate is eligible for release. Under §125.27(1)(a)(iii), however, the death penalty must be imposed upon anyone convicted of intentional homicide who is serving a term of imprisonment of fifteen years or more to life. Thus, one "lifer" for §125.27(1)(a)(iii) purposes may be due for release in two days. Another might have fifteen more years to serve. Despite the obvious differences between the two, both would have been sentenced to death.[6]

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[6]In defending the constitutionality
(Footnote Continued)

Under New York's Penal Law, the imposition of a 15-to-life term is not infrequent. Conviction of any Class A-1 felony requires the imposition of at least such a term. In addition to murder, these felonies include arson, N.Y. Penal Law §150.20; kidnapping, id. at §135.25; conspiracy to commit any Class A felony with a person under 16, id. at §105.30; illegal sale of two or more ounces of any narcotic drug, id. at §220.34(1); illegal

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(Footnote Continued)
of §125.27(1)(a)(iii), Petitioner askes this Court to consider a hypothetical inmate, about to be released, who sexually assaults a guard, and then kills her so that she will not be a witness against him. Putting aside the Petitioner's implicit assumption that prison inmates are totally irrational animals, the hypothetical suggests a much narrower type of mandatory statute, thereby underscoring the breadth of §125.27(1)(a)(iii). In addition, the hypothetical fails to explain why a discretionary death penalty would not suffice as a deterrent, especially since murder to silence a witness, like murder by a "lifer," would be considered a powerful aggravating factor.

sale of 2,880+ milligrams of methadone, id. at §220.21(2); attempted first degree murder, id. at §110.05(1); attempted criminal possession of a controlled substance in the first degree, id.; and attempted criminal sale of a controlled substance in the first degree, id. In addition, under New York's persistent felony offender statute, N.Y. Penal Law §70.10, a 15-to-life term may be imposed upon a defendant convicted of three consecutive felonies, no matter what the felonies were.

Given the wide variety of offenses, many of them non-violent, for which a 15-to-life term may be imposed, and the obvious character differences between persistent check forgers, on one hand, and mass murderers, on the other, it is ludicrous to contend that all of these "lifers" who kill automatically deserve the same penalty. For example, an inmate

serving a 15-to-life term for passing three bad checks might kill an inmate in a prison fight. Another prisoner, serving a 15-to-life sentence for the torture-murder of two hundred children, might mastermind a prison breakout in which he kills several guards and civilians. In both cases, the death penalty would have to be imposed, because §§60.06 and 125.27(1)(a)(iii) presuppose that lifers who kill are an "undifferentiated mass" deserving of the same penalty. The failure to distinguish between very disparate offenses and offenders renders the statute unconstitutional.

III. PETITIONER HAS IMPLICITLY CONCEDED THAT NEW YORK PENAL LAW §125.27(1)(a)(iii) IS UNCONSTITUTIONAL

In continuing a tactic begun during pre-trial proceedings in 1981, Petitioner recounts Respondent's alleged criminal history, citing offenses for which Respondent was not indicted, tried, or

convicted, and making allegations that Respondent has never had an opportunity to rebut. Pet. for Cert. at ii-iii, 26-29. Following this litany, Petitioner conducts a brief, paper, "mitigation" "hearing," id. at 30, in which no mitigating factors are found, bizarrely entitles another recapitulation of Respondent's alleged criminal history as "Prognosis," id. at 31, and then concludes that no mitigating factors could possibly outweigh the aggravating factors. id.

This ex parte, paper "hearing" in which Petitioner plays prosecutor, defense, judge, and jury, indicates a central theoretical problem that petitioner has encountered in defending the constitutionality of §125.27(1)(a)(iii). To show that the statute is constitutional as applied to Respondent, Petitioner argues that Respondent's criminal background is so horrible that he would be

sentenced to death under any type of capital punishment statute. In so doing, Petitioner concedes the need to weigh aggravating and mitigating factors, but argues that this function should be left to the prosecutor, not to a judge or jury. Thus, it is clear that Petitioner relies on his view of Respondent's criminal background and character to argue for the death penalty. It is equally clear that Respondent must be given an opportunity to rebut these allegations and offer reasons as to why he should not be put to death.

Conclusion

For the foregoing reasons, the special prosecutor's petition for a writ of certiorari to the Court of Appeals of the State of New York should be denied.

Dated: New York, N.Y.
October 28, 1984

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